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The Establishment Clause Gag Reflex

*Frederick Mark Gedicks**

Last summer, I attended a dinner with some law professors who write about Religion Clause issues. It is a measure of our lack of imagination that we spent most of the evening talking about—you guessed it—Religion Clause issues. As the conversation progressed, I found myself defending the results in various cases on what I described as “realist” grounds—that is, not on the basis of supposedly “neutral principles,” but by reference to my assessment of the kinds of church-state interactions that most Americans would tolerate. At one point in the conversation, someone suggested—and to date no one has been willing to accept credit or blame for it—that I was relying on an “Establishment Clause gag reflex.”

The conventional way of titling a paper is to write the paper first, then to choose a title that captures and communicates the paper’s thesis. But I was so taken with the idea encapsulated within this phrase—the Establishment Clause gag reflex—that when I was asked to participate on this panel, I decided that this would be my title, around which I would write the paper. The Establishment Clause gag reflex is an instinctive intellectual revulsion to the possibility of particular resolutions of Establishment Clause cases. Though not a doctrinal rule, it emphasizes important constitutional instincts about the Establishment Clause when the apparently correct doctrinal resolution of a case seems untenable.

In medical terms, the “gag reflex” refers to the normal choking or retching reflex “caused esp[ecially] by stimulation (as by touch) of the pharynx.”¹ The term derives from the verb “to gag,” which means to nauseate or to choke,² combined with the noun “reflex,” which refers, among other things, to “an act . . . performed automatically and without conscious volition in consequence of a

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1. MERRIAM-WEBSTER’S MEDICAL DESK DICTIONARY 293 (1996).

2. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 928 (2002).

nervous impulse.”³ As an involuntary physical response, the gag reflex is often grouped with other so-called “unconditioned” physical responses that share the characteristic of being “automatic instinctive unlearned reaction[s] to [some] stimulus.”⁴

“Gag” and “gag reflex” have long had figurative as well as physiological meanings. In fact, figurative usage is quite evident on the Internet—there is an apparent competition among a certain class of bloggers⁵ to see who can publicize the most disgusting anecdotes—that is, anecdotes that might make one gag. These entries are typically posted with “gag reflex” in the title or subject line, so they pop right up in a Google search. (I will spare the reader the actual examples, but they provide yet another illustration of the wondrous information that the digital revolution has placed at our fingertips.)

In a more conventional vein, the Oxford English Dictionary includes a number of figurative usages of the verb “to gag,” including one from a nineteenth-century dictionary—“to reject with loathing”⁶—and this suggestively obsessive one from John Steinbeck: “The idea gagged him, but he couldn’t let it alone.”⁷ In its figurative sense, then, “gag reflex” refers to an immediate, intellectually instinctive reaction of disgust or rejection when confronted with a distasteful idea, event, or situation.

A *constitutional* gag reflex would refer to the instinctive intellectual revulsion one might feel in response to the doctrine or holding of a case. One would hope, for example, that a contemporary judicial decision that countenanced permanent denial of citizenship to racial minorities⁸ or that denied such minorities the liberty or equality rights enjoyed by whites⁹ would induce a collective

3. *Id.* at 1908.

4. THE FREE DICTIONARY, at http://www.thefreedictionary.com/gag_reflex (last visited Sept. 14, 2004).

5. “Blogger” refers to a person who posts regular comments to one of the online journals, known as “weblogs” or “blogs,” which are increasingly appearing on the World Wide Web.

6. OXFORD ENGLISH DICTIONARY (2d ed. 1989), http://dictionary.oed.com/cgi/entry/00091556?query_type=word&queryword=gag (quoting ROBERT FORBY, THE VOCABULARY OF EAST ANGLIA (1825)).

7. *Id.* (quoting JOHN STEINBECK, CANNERY ROW 107 (1945)).

8. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

9. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Plessy v. Ferguson, 163 U.S. 537 (1896).

“gag” by most Americans. The constitutional gag reflex functions rhetorically much like the “parade of horrors,” in which one typically lists all of the ostensible horrors that would follow from the outcome one opposes. Justice Scalia relied on this technique to good (if controversial) effect in *Employment Division v. Smith*.¹⁰ However, the parade of horrors derives its rhetorical force as much from the length of the parade as from its participants, whereas the constitutional gag reflex is triggered by a sole potentiality whose singular undesirability is so obvious that its mere possibility causes one instinctively to shudder, albeit intellectually.

A little over twenty years ago, shortly after I graduated from law school, Federal District Judge Brevard Hand of Alabama held that the Establishment Clause of the First Amendment did not apply to the states and that as a consequence Alabama was constitutionally empowered to establish an official state church if it wished.¹¹ Now, the application of the First Amendment and the other substantive provisions of the Bill of Rights to the states is an impossibly arcane topic that exists as an issue at all only because the Supreme Court bungled the *Slaughter-House Cases*.¹² Ask ten ordinary people—ask a *hundred* ordinary people—what incorporation of the Bill of Rights is about, and chances are that none of them will have the least idea what it *is*, let alone how it *works*. (This may be true even if the hundred people are law students, as I am reminded every year by the struggles of my first-year constitutional law students with “absorption,”¹³ “ordered liberty,”¹⁴ “fundamental fairness,”¹⁵

10. 494 U.S. 872, 888–89 (1990) (arguing that requiring incidental burdens on religious practices to be justified by a compelling governmental interest “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races” (citations omitted)).

11. *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104, 1118–19 (S.D. Ala. 1983).

12. 83 U.S. 36 (1872) (holding, inter alia, that the Privileges and Immunities Clause of Section 1 of the Fourteenth Amendment did not subject the states to the provisions of the Bill of Rights or to the natural rights protected by the Privileges and Immunities Clause of Article IV). There is widespread academic agreement that this holding is simply wrong as a matter of history. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS 207–10* (1989); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE 172–79* (1986).

13. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

14. *Id.* at 325.

“jot[s]-for-jot[s],”¹⁶ and other subtle variations on how most of the substantive provisions of the Bill of Rights came to bind the states.) But tell these same people that the Establishment Clause would not prevent Alabama from designating, say, all congregations affiliated with the Southern Baptist Convention as official state churches entitled to preferential state funding and other special privileges, and they will react with instinctive incredulity, just as I did: “What? No way!” (or, in our current post-Seinfeldian era, “Get *out!*”). Predictably, Judge Hand’s incorporation holding—or, rather, his nonincorporation holding—was quickly reversed.¹⁷

Hypothetical reactions to Judge Hand’s decision illustrate quite well how the constitutional gag reflex works: it is an immediate, intellectually instinctive reaction against an untenable result. The reaction is rarely rooted in reason or principle; it is the intellectual equivalent of a physical reflex—not the result of voluntary thinking, but rather an instant deduction from background assumptions that are rarely discussed. There are, in fact, serious difficulties with incorporation of the Establishment Clause, including that the Clause was apparently designed as a federalist protection of state establishments¹⁸ and that the framers of the Fourteenth Amendment

15. *Betts v. Brady*, 316 U.S. 455, 462 (1942).

16. *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

17. *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983), *aff’d*, 466 U.S. 924 (1984).

18. See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 26 (1998) (“Ignoring federalism in the [Establishment] Clause was an act of sheer judicial will which is still debated by academicians today.”); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1709–12 (1992) (arguing that because the Establishment Clause is a structural limitation on Congress enacted to preserve state regulatory control over religion against federal encroachment, its incorporation against the states was incoherent). See generally Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1608–09 (1995) (arguing that as a structural provision designed to protect the states against congressional interference, “the entire First Amendment [is] a poor candidate for any textually rigorous theory of incorporation”). Justice Brennan authored the classic defense of incorporation of the Establishment Clause in his concurring opinion in *School District v. Schempp*, 374 U.S. 203, 256 (1963), arguing that extension of the antiestablishment prohibition to the states was necessary for the United States to fully realize the First Amendment’s guarantee of religious liberty. For an academic defense of Establishment Clause incorporation, see Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

had precious little to say about state establishments.¹⁹ It is not difficult to construct a plausible argument that the Establishment Clause either cannot be or was not incorporated against the states. But none of this really matters very much. As a country, and certainly as an academy, we have heard and talked and thought and written about separation of church and state to such an extent that, whatever we might think the Establishment Clause does or does not prohibit, we agree that the very idea that it might permit a classic state-established church is simply unthinkable.²⁰ It is the unthinkability of the state-established church, not its purported unjustifiability, that constitutes the most powerful argument against it. This is the Establishment Clause gag reflex.

Recurrence to the Establishment Clause gag reflex is a helpful way to think about the current state of Establishment Clause doctrine. For the last two decades, the rhetorical center of the Clause has shifted from a concern with separating church and state to a concern with treating religion neutrally or equally with respect to secular activities.²¹ The question of the day is whether neutrality should entirely displace separation or whether separation should continue to trump neutrality in some situations. If neutrality is conceptually pushed as far as it can go, the outcomes it justifies could trigger the Establishment Clause gag reflex. The Court has declined to allow neutrality entirely to displace separation as a

19. MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 87–90 (2002) (summarizing the historical difficulties with incorporation of the Establishment Clause).

20. See, e.g., Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1090–95 (2002) (arguing that the virtually undisputed central meaning of the Establishment Clause is prohibition of a government-established church that exercised government authority, received government financial support, and was subjected to government control). But see *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330–31 (2004) (Thomas, J., concurring in the judgment) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause. . . . As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to ‘an establishment of religion.’”).

21. For an account of this shift, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future*, in CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 191 (Stephen V. Monsma ed., 2002).

doctrinal principle,²² but has not attempted to define the limit on neutrality.

Locke v. Davey,²³ for example, seemed to be about religious discrimination, as the appellee and the dissenting Justices argued.²⁴ The State's denial of a widely available state scholarship to students solely because they were pursuing a divinity or theology degree certainly looked like the straightforward, garden-variety religious discrimination that the Equal Protection, Free Exercise, and Establishment Clauses all prohibit.²⁵ It also looked like content-based discrimination by the State against certain programs of religious education (which, after all, is speech).²⁶ Neutrality would seem to require that religious individuals who otherwise qualify for state educational aid not be denied such aid simply because of their theological course of study.

But if this doctrinal principle had been implemented, it would have inevitably triggered paradigm violations of the Establishment Clause. For example, if a state made block grants available to local governments for construction of community centers, would the state

22. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304–05 (2000) (invalidating invocations led by popularly elected student designees prior to high school football games).

23. 124 S. Ct. 1307 (2004).

24. *Id.* at 1312, 1315–16 (Scalia, J., dissenting).

25. With respect to the Equal Protection Clause, see *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), which held that the denial of an application by Jehovah's Witnesses' to use a city park because of government distaste for Witnesses' beliefs violated the "right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments." *See also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that a "presumption of constitutionality" should not attach to "statutes directed at particular religions"); *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900) (suggesting that tax exemptions drawn on the basis of "color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers" are "purely arbitrary, oppressive, or capricious" and deny "the equal protection of the laws to the less favored classes"). With respect to the Free Exercise Clause, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), which states, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." With respect to the Establishment Clause, see *Larson v. Valente*, 456 U.S. 228, 246–47 (1982), where a statute whose effect was to subject only certain minority religions to fundraising registration and reporting requirements was found to be suspect denominational preference under the Establishment Clause, which must be "closely fitted" to furthering a "compelling governmental interest." *See also* *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (stating that the Establishment Clause prohibits government from using religion "as a basis of classification for the imposition of duties, penalties, privileges or benefits").

26. *See Davey*, 124 S. Ct. at 1312 n.3.

really be constitutionally prohibited from withholding grants from those cities that wish to use the grants to construct churches? If government provides money to subsidize the salaries of those who run youth recreation programs, must it allow the money to subsidize the salary of a church's youth recreation minister? And if government chooses to fund the provision of social services by private groups or individuals, must it fund religious worship or conversion that is integrated into such services? Much of the United States and most of the legal academy would gag on each of these.

The Establishment Clause gag reflex was very much in evidence at the oral argument of *Davey*. Moderate and liberal Justices repeatedly asked Davey's counsel, Jay Sekulow, whether it could really be correct that a state's decision to subsidize secular activities triggers a constitutional obligation to subsidize all comparable religious activities. The incredulity of these Justices at Mr. Sekulow's defense of this principle was evident.²⁷ What was surprising about the Court's decision in *Davey* was not its holding that the state's refusal to fund devotional education did not constitute prohibited discrimination under the Free Exercise Clause,²⁸ but its failure to cite the abortion-funding decisions, which had already established that a state's subsidization of some constitutionally protected activities does not require that the state subsidize all comparable or related constitutional activities.²⁹

One can also use the Establishment Clause gag reflex as a negative indicator—that is, as a means of ascertaining that no constitutional violation exists despite the presence of a church-state relation that seems clearly to violate the Clause, because the apparent violation simply does not induce a gag. Professor Marshall, for

27. See, e.g., Transcript of Oral Argument at 31–32, 39, *Davey* (No. 02–1315) (expressing skepticism at Mr. Sekulow's contention that inclusion of religious schools in an educational-voucher system is constitutionally required); see also *id.* at 47 (relating Mr. Sekulow's agreement that "if the state has a general program for funding instruction, and this is religious instruction, it's got to fund religious instruction and there's no middle ground, there's no play in the joints there").

28. See *Davey*, 124 S. Ct. at 1313 ("The State has merely chosen not to fund a distinct category of instruction.").

29. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding federal regulations that prohibited institutional recipients of Title X funds from discussing abortion as a method of family planning and that further required that abortion services be provided by such recipients in a physically separate location); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding a state Medicaid program that paid for medical expenses of childbirth but not for medical expenses associated with elective abortion).

example, has suggested that the widespread government endorsements of religious worship and expression in the wake of the September 11 trade tower bombings were obvious formal violations of the Establishment Clause but should not be treated as such.³⁰ I have a similar view of the Ninth Circuit's decision in *Newdow v. U.S. Congress*,³¹ which declared that inclusion of the words "under God" in the Pledge of Allegiance violates the Establishment Clause.³² Amidst all the political controversy triggered by this decision, one can lose sight of the fact that the Ninth Circuit's opinion in the case was an unremarkable, even mundane, application of Supreme Court precedent.³³ Nevertheless, it is hard to get very distressed about a government-sponsored ceremony whose content is almost entirely secular and patriotic and in which religious and secular dissenters may decline to participate or may meaningfully participate without voicing the religious content in question. It just does not induce a gag.

Now, I realize that it is rather undignified to assess a rule of law—especially a rule of constitutional law—in terms of whether it makes you want to throw up, even if only figuratively. But this is not so unusual, even in constitutional law. Justice Holmes's test for the constitutionality of economic legislation, for example, was the constitutional gag reflex: so long as the government had considered all of the relevant factors, its judgment should be accepted "unless it makes us puke."³⁴ There has long been a "shock-the-conscience" test

30. William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002).

31. 328 F.3d 466 (9th Cir. 2003), *rev'd on other grounds sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

32. *Id.* at 490.

33. *See Lee v. Weisman*, 505 U.S. 577, 599 (1992) (invalidating a school's practice of prayer at graduation ceremonies because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631, 633 (1943) (finding that a school district's mandatory pledge-recital policy unconstitutionally "comp[els]" students "to declare a belief" and improperly "requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] . . . bespeaks"); *see also Lee*, 505 U.S. at 593 ("The undeniable fact is that the school district's supervision and control of a . . . ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the [ceremony]. This pressure, though subtle and indirect, can be as real as any overt compulsion.").

34. Letter from Oliver Wendell Holmes, to Harold J. Laski (Oct. 23, 1926), in 2 HOLMES-LASKI LETTERS 888 (Mark DeWolfe Howe ed., 1953).

in criminal procedure under the Due Process Clause,³⁵ and more recently there has arisen an “undue” burden test for the constitutionality of abortion regulations under the same Clause³⁶—these are little different from gag reflex tests. Indeed, the foundation of the right to sexual privacy, articulated in *Grissold v. Connecticut*,³⁷ clearly rests on the gag reflex triggered by imagined enforcement of a law that prohibited the *use* of condoms by married couples, as opposed to their mere sale or distribution.³⁸ Even familiar tests like the average-reasonable-person test for negligence and—yes!—the much maligned “objective observer” test bequeathed to us by Justice O’Connor,³⁹ though they lack the edge implied by “gag reflex,” are really just more formal ways of posing the question: “Would most people find it unthinkable for the defendant or the government to act in this way, or not?” Like the average reasonable person, the objective observer can be filled up with whatever knowledge and characteristics are needed to justify a particular decision.

But the gag reflex is not only familiar, it is also fundamental to constitutional doctrine, although we may not like to admit it. When doctrinal resources allow multiple, inconsistent, equally plausible

35. *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952) (characterizing a forcible pumping of defendant’s stomach as police conduct that “shocks the conscience” and thereby violates the constitutional guarantee of due process).

36. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision [to abort her pregnancy] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

37. 381 U.S. 479 (1965).

38. *See id.* at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”); *see also* *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

Of this whole “private realm of family life” it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations. . . .

. . . .
 . . . [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Id. at 552–53.

39. *See* *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 688–90 (1984) (O’Connor, J., concurring).

outcomes to a case—as is almost always the situation in Supreme Court litigation—then clearly doctrine is not deciding the case. Under the Establishment Clause, neutrality may be the more principled and dependable doctrine, but separation of church and state has long been part of our constitutional tradition and prevents us from swallowing many church-state relationships and arrangements that are fully justified by neutrality. The Establishment Clause gag reflex, in other words, gives voice to an important constitutional instinct about church-state relations that might not otherwise be expressed.

Let me close with a question asked by Justice Breyer of the Solicitor General, Theodore Olson, at oral argument in *Davey*:

QUESTION: What — what is your response to the following concern that's been brought up a few times but I'd like you to address it directly. This case is perhaps a small matter of a distinction that doesn't make all that much sense, but makes some. But the implications of this case are breathtaking, that it would mean if your side wins, that every program, not just educational programs, but nursing programs, hospital programs, social welfare programs, contracting programs throughout the governments would go over, you'd have to go over each of them and there'd be a claim in each instance that they cannot be purely secular, that they must fund all religions who want to do the same thing, and that those religions, by the way, though it may be an excellent principle, may get into fights with each other about billions and billions of dollars So, I'd like you to address that.

MR. OLSON: Yes, Justice Breyer. It is not a major step at all in this Court's jurisprudence⁴⁰

What? Get *out*!

40. Transcript of Oral Argument at 51–52, *Locke v. Davey*, 124 S. Ct. 1307 (2004) (No. 02–1315). In fairness to General Olson, his full response made this point in a more nuanced way. His full answer to the question argued that it

is not a major step in this Court's jurisprudence to say that those funding programs for medicine, doctors, nurses, cannot distinguish and not discriminate against a person who decides to go to a Catholic nurse or to a Catholic doctor. If money is made available for individuals in the Medicare program to exclude people that want to go to religious hospitals for their heart surgery, that would violate the Free Exercise Clause.

Id. at 52.